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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 487

ATLANTIC COAST LINE RAILROAD COMPANY, AND LOUISVILLE AND NASHVILLE RAILROAD COMPANY, DOING BUSINESS AS CLINCHFIELD RAILROAD COMPANY,

Petitioners,

vs.

DOCK L. MEEKS, BY NEXT FRIEND, ADA FONEY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE, EASTERN SECTION SITTING AT KNOXVILLE, TENNESSEE, AND BRIEF IN SUPPORT THEREOF.

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vs.

DOCK L. MEEKS, BY NEXT FRIEND, ADA FONEY, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE, EASTERN SECTION SITTING AT KNOXVILLE, TENNESSEE.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Come Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, doing business as Clinchfield Railroad Company, the above-named Petitioners, and respectfully petition this Honorable Court to grant Writ of Certiorari to review the decision and judgment of the Court of Appeals of Tennessee, Eastern Section, sitting at Knoxville, Tennessee, the decision and judgment having been rendered and entered on July 9, 1947 (R. 82; R. 93),

in the case lately pending in said Court of Appeals of Tennessee, Eastern Section, styled Atlantic Coast Line Railroad Company, et al., Plaintiffs-in-Error, vs. Dock L. Meeks, Defendant-in-Error, being Law Cause Number 2 of Causes on the docket of said Appeals Court of Tennessee, Eastern Division, affirming the judgment of $15,000.00 and costs, including interest, of the Johnson City, Tennessee Law Court in said cause, in favor of Respondent and against the Petitioners herein, which said decision and judgment of the Appeals Court of Tennessee, Eastern Section, became final on the 3rd day of October, 1947, the date of the decision of the Supreme Court of Tennessee, or October 6, 1947, the date of the Order of said Court putting its Opinion into effect denying Petitioners' application for the Writ of Certiorari (R. 95).

The judgment of the Supreme Court of Tennessee on its decision denying Petitioners' application for the Writ of Certiorari was rendered and entered on October 6, 1947 (R. 100).

The method followed in seeking a review of a decision of the Appeals Court of Tennessee is by sworn petition filed in the Supreme Court of Tennessee, together with assignments of error and supporting brief (Volume 6, Williams Tennessee Code Annotated, Section 10629).

The decision of the Court of Appeals of Tennessee, on July 9, 1947 (R. 82), and the judgment rendered pursuant thereto on the same date (R. 93) are now sought to be reviewed by Certiorari. They present questions under the Federal Employers' Liability Act of Congress, not heretofore passed upon by this Honorable Court so far as Petitioners have been able to ascertain, which the Tennessee Courts decided adversely to the Federal Act as Petitioners verily believe.

Decisions and Judgments of the Court Below

The entire decision of the Court of Appeals appears on pages 82 to 93 of the Record filed herewith. The decision of the Supreme Court of Tennessee denying the Writ of Certiorari and thereby refusing to take jurisdiction of the case appears on pages 95 and 100 of the Record.

Respondent's alleged cause of action is based on the Federal Employers' Liability Act. Petitioners believe that the relation of employer and employee did not exist between Respondent and Petitioners at the time Respondent was injured and that, therefore, Respondent's alleged cause of action is not within the purview of the Federal Employers' Liability Act. Petitioners insist that an examination of the opinions of the Court of Appeals of Tennessee and the Supreme Court of Tennessee will show that these Courts, in holding that Respondent was within the purview of the Act at the time of his injuries, judicially extended the coverage of said Act beyond its meaning and contrary to Federal decisions and Federal policy, thereby depriving Petitioners of their rights under said Federal Employers Liability Act, the injustices of which can now be corrected only on review by the Court to whom this petition for Writ of Certiorari is addressed.

Nature of Case and Summary Statement of the Matter Involved

This is an action at law under the Federal Employers' Liability Act (Title 45, U. S. C. A., Section 51, et seq.; Act of April 22, 1908, C. 149, Section 1, 35 Stat. 65; et seq., August 11, 1939, C. 685, Section 1, 53 Stat. 1404, et seq., 3565 et seq.), instituted by Respondent against Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, doing business as Clinchfield Rail-

road Company (Petitioners) to recover damages for injuries sustained by Respondent around 10:30 at night on January 4, 1946 (R. 14). On this occasion Respondent sustained burns in a bunk car belonging to Petitioners and located on one of their railroad tracks in Johnson City, Tennessee. The burns were sustained by reason of an ignited torch being thrown by one Angelo Jackson on the body of Respondent immediately following the explosion of the torch (R. 13-14).

Respondent first sued the Petitioners on July 2, 1946, for these injuries under the Workmen's Compensation Law of Tennessee, claiming permanent, partial disability (R. 3-5).

Petitioners denied liability on the Workmen's Compensation suit by answer filed August 12, 1946 (R. 6-8).

On September 6, 1946, Respondent filed his Declaration, basing his cause of action on the Federal Employers' Liability Act, claiming damages in the amount of $25,000.00. In this suit he claimed that his injuries were permanent and total (R. 13, 16).

Petitioners filed plea of former suit pending to the Federal Employers' Liability suit, insisting that Respondent should be required to elect which suit he would try first (R. 17), but upon motion of the Respondent this plea was dismissed (R. 18).

After Petitioners' special plea of former suit pending was dismissed, Petitioners then filed a plea of the general issue (R. 16).

The two suits, viz, the Workmen's Compensation suit and the Federal Employers' Liability suit, were tried together over objection of Petitioners, at the November, 1946 term of the Law Court in Johnson City, Tennessee (R. 31, 32, and 48).

At the conclusion of all the proof, and in over-ruling Petitioners' motion for directed verdict, the Trial Court held: "That this litigation should be proceeded with under the Interstate Commerce Act", meaning the Federal Employers' Liability Act; hence the case was submitted to the jury as a claim based on the Federal Employers' Liability Act (R. 71).

The Jury rendered a verdict in favor of Respondent for $15,000.00 (R. 80). Judgment was rendered against the Petitioners in the amount of $15,000.00 on the verdict (R. 19-20).

Allegations in Respondent's Petition in Compensation Case

It is averred that Respondent was employed by Petitioners to work on the Railroad as a section hand, and that on January 4, 1946, at approximately 10:00 P. M., Respondent was getting ready to retire in a camp car when a torch which was being filled by Angelo Jackson exploded; that the torch was being filled with an explosive liquid; that the liquid ignited the torch and Jackson threw the ignited torch on Respondent and burned him severely "on the lower abdomen, thigh, penis and scrotum"; that as a result of the burns Respondent was confined to his bed "and the wounds are not completely healed"; that Respondent has been totally disabled and he is advised that this condition will continue for some time in the future "and that he will suffer permanent partial disability by reason of the scars and drawing of his muscles;" that Respondent's injuries occurred "in bunk cars which were provided by the Defendant Railroad Company and in which the Defendant Railroad Company required the section hands to sleep, and said injuries arose out of and in the course of his employment;" that at the time of the injuries, Respondent was making a weekly wage of $52.50 per week and "he is en-

titled to full compensation as provided by the Workmen's Compensation Act of the State of Tennessee" (R. 3-5).

Petitioners' Answer to Workmen's Compensation Suit

The Answer of the Petitioners to the Compensation suit denied that Respondent was entitled to recover under the Workmen's Compensation Law. The answer admitted that Respondent sustained the injuries on account of burns on the night of January 4, 1946, but denied that such injuries arose out of and in the course of his employment. The answer stated, among other things, that *"Defendants deny that Petitioner was working for them or either of them at the time he sustained his injuries. Petitioner was released from work on Thursday January 3, 1946, at 6:00 o'clock P. M. and did not sustain his injuries until the following night, or January 4, 1946, as shown in the Petition"* (R. 6, 7). (Emphasis ours.)

Declaration Based on Federal Employers' Liability Act

The descriptive portions of the Declaration relating to Respondent's injuries and the date and circumstances under which they occurred are practically the same as those set forth in his petition under the Workmen's Compensation Act. The acts of negligence charged in the Declaration are: (a) Petitioners furnished a defective torch or lamp to illuminate the bunk car in which Respondent was injured; (b) Angelo Jackson, fellow employee of Respondent, was negligent in filling the lamp or torch while said torch or lamp was burning, and in throwing it against Respondent; (c) The Petitioners were negligent in not having the lamp or torch lighted by an expert; (d) Petitioners were negligent in furnishing to the employees an explosive and highly-inflammable material or fluid for use in the lamp or torch; (e) Petitioners were negligent in not providing

for Respondent a place to wait and sleep in which he would be safe (R. 15, 16).

Respondent is the only witness who testified as to the facts leading up to and surrounding the accident and resulting injuries.

For a thorough understanding of the facts and circumstances surrounding Respondent's injuries, and his relationship to the Petitioners at the time of said injuries, and to show the errors of the Court of Appeals and Supreme Court in holding that Respondent was covered by the Federal Employers' Liability Act at the time he was injured, the Court's attention is called to the following facts:

Respondent began working for Petitioners as a section hand on what he described as the "extra gang" in either September or October, 1945, at Starnes, Virginia (R. 42, 56). He lived, along with the other members of his group, in shanty cars. Shanty cars are railroad boxcars with bunks in them (R. 43). He, and the members of his group, worked on the railroad tracks of Petitioners from Erwin, Tennessee to Dante, Virginia (R. 43). These shanty cars were, of course, furnished by the Petitioners, but Respondent, as well as the other members of his group, paid for their own food and furnished their own bed clothes (R. 60). These cars had lamps for illumination purposes, but the employees likewise paid for the globes used in the lamps (R. 61).

Respondent was laid off from his work for the week on Thursday, around 6:00 P. M. and was not to return to work until Monday, January 7, 1946. The calendar will show that the Thursday on which he was laid off was January 3, 1946. On Friday morning (January 4, 1946) he caught a bus in Johnson City to Erwin to procure his pay check (R. 56). He went with another boy to Erwin on January 4 (R. 45). He wanted his check so that he could return to Johnson

City and do some shopping before catching the 11:00 o'clock train for his home in Union Hill, North Carolina (R. 40-45). After procuring his check he did some shopping in one of the stores in Erwin where the check was cashed, and the train which he expected to ride to his home pulled out while he was engaged in shopping. He stated that he told his boss "I am going back to Erwin to do a little shopping and sleep in the shanty car tonight," and his boss replied, "All right" (R. 45). Gus Dober was his boss (R. 58). Mr. Dober caught the Erwin morning train for his home after giving Respondent his check (R. 58). After spending the day in Erwin shopping, and visiting the home of his friend, Dan Lyon, a colored boy who lives in Erwin, he returned to Johnson City by bus around 5:00 o'clock on Friday afternoon (R. 45, 59). Angelo Jackson, Pat Sellers and Dan Lyon returned to Johnson City with him (R. 59). Upon returning to Johnson City all of them went to a moving picture show where they remained until around 9:30 P. M. (R. 45, 60). After getting out of the picture show, Sellers, Jackson and Respondent returned to the shanty car around 10:30 P. M., having lost the Lyon boy in the movie (R. 45, 60). After returning to the shanty car they found that there was no light in one end of this car. Respondent struck a match to light what he described as a flambeau (R. 45). A flambeau is a can to which is attached a "long snout" with a wick on it. The snout has a handle on it (R. 46). The flambeau was furnished by the Petitioners (R. 46). After Respondent lit the wick on the flambeau "there was a little blue blaze up there. It was about to go out." Angelo then procured a quart can of oil which was in the car and "started to pour it in that flambeau. It exploded, it blazed up, exploded. He throwed it down to get rid of it, and it bounced upon me" (R. 46). The flame from the flambeau burned Respondent through his clothing and he was immediately taken to the Appalachian Hospital

(R. 47, 48). The fluid which was used by Angelo to fill the flambeau smelled like gasoline instead of kerosense (R. 47).

Sullins, Simmons, Jackson and Copeny, members of Respondent's group, stayed in the shanty cars on the night Respondent sustained his injuries (R. 50-51).

Respondent intended to go to his home on Saturday morning and return to Johnson City by train on the following Sunday so that he could return to work on the following Monday morning (R. 51). Petitioners furnished free transportation on their trains to their employees to go to their homes and return on week ends (R. 50).

According to Respondent, the Petitioners did not object to the members of their section crew staying in the shanty cars over the week ends if they so desired.

In reply to a question on direct examination he stated:

"A. . . . We could stay up there if we wanted to.
Q. Usually, though, you went home?" (R. 51)

The shanty cars of Petitioners at the time of Respondent's injuries were located on their tracks near the new post office in Johnson City (R. 52). The last work, however, was done by the members of the crew before they were laid off on Thursday January 3, 1946, near the Soldiers Home in Johnson City (R. 55).

Respondent made fifty-five cents an hour while working forty hours per week (R. 51).

He was told by some of the members of his crew that he was subject to call in the event of an emergency at any time, although his boss did not so advise him (R. 54).

He stated that he was also told that he had to live in the shanty cars while working for the defendants (R. 52).

He further stated that at the time he was laid off from work on Thursday, January 3, 1946, he expected to return

to work on Monday, January 7, 1946. These are his answers to questions on direct examination:

Mr. Bralley:

"Q. Well, did you expect to go back to work Monday?

A. Yes, sir.

Q. And you were going to assume your duties?

A. Yes, sir" (R. 54).

The members of Respondent's group worked on January 1, 1946, so that they could close their work on Thursday, January 3, 1946 (R. 64). Respondent so stated as follows:

"Q. You worked on January 1, the holiday?

A. Yes, sir.

Q. So that you could close your work on Thursday that week?

A. Yes, sir.

Q. And from the time you got off at six o'clock on Thursday of that week——

A. Yes.

Q. ——you never worked on the tracks or did any work on the tracks?

A. No, sir.

Q. Now, you were coming back to work——

A. Monday morning.

Q. ——on Monday?

A. I mean on Sunday.

Q. But you were going to start work again on the tracks on Monday?

A. Monday is right; yes, sir" (R. 64).

Respondent repeated the statement that he was told that he could stay in the shanty cars if he wanted to. The following are his answers to questions on redirect examination:

Mr. Bralley:

"Q. You say you were told you could stay in these cars if you wanted to?

A. Yes, sir.

Q. Some other men, to your knowledge, stayed over the week end?

A. Yes, sir; they stayed.

Q. You were going back to work Monday morning?

A. Yes, sir, I was going home on Saturday, coming back Sunday, be there Monday" (R. 66).

Many of the employees of Respondent's group caught train No. 38 of the Petitioner's on Friday morning, January 4, to go to their homes in North and South Carolina (R. 56). Mr. Dober, the boss of the entire group, left on this train for his home (R. 66).

There were around seventeen people in Respondent's group and all of them, including Gus Dober, the foreman of the group, except five left Johnson City for their respective homes on Friday January 4, 1946 (R. 66).

Summary of Holding of Court of Appeals

The Court of Appeals held:

(a) That there was material evidence presented to the jury wherein they could find that the relation of employer and employee or master and servant existed between the parties at the time of the injury (C. A. Opinion, R. 87).

(b) That although Respondent was not working at the time of his injury he was engaged in matters incident to his employment and therefore covered by the Federal Employers' Liability Act (C. A. Opinion, R. 90).

(c) That the action of the trial court in trying the Workmen's Compensation case and the Federal Employers' Liability case together was proper (C. A. Opinion, R. 92).

Summary of Holding of Supreme Court Opinion Denying Application for Writ of Certiorari and Refusing to Take Jurisdiction of the Case.

The learned Supreme Court held:

That Respondent was an employee of Petitioners at the time of his injury and was engaged in acts incidental to his employment (Sup. Ct. Opinion, R. 99).

The reasons given by the Supreme Court for holding that Respondent was engaged in acts incidental to his employment at the time of his injury were:

(1) That he was injured on the premises of Petitioners and subject to Petitioners' control, where he had a contractual right to be and receive a benefit, namely, a place to sleep.

(2) He was injured by an instrument furnished by the Petitioners, and the risk arose by reason of the peculiar conditions of the employment imposed by the Petitioners.

(3) And he was subject to call at any time in case of an emergency or for extra repairs on the tracks of the Petitioners (Sup. Ct. Opn., R. 99).

Jurisdiction of This Court

The jurisdiction of this Court is based upon Section 237 of the Judicial Code as last amended by the Act of February 13, 1925; Chapter 225, Section 1, 43 Stat. 937, Title 28, U. S. C. A. Section 344, providing that it shall be competent for this Court, by Certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like affect as if brought up by Writ of Error, any cause wherein a final judgment or decree has been rendered by the highest Court of a State, in which a decision could be had on any title, right, privilege or immunity especially set up or claimed

by either party under the Constitution, or any treaty or statute, or commission held or authority exercised under the United States.

As stated hereinbefore, the judgment of the Court of Appeals of Tennessee sought to be reviewed was entered on July 9, 1947 (R. 82, 93).

Petitioners in due course applied to the Supreme Court of Tennessee for the Writ of Certiorari to have reviewed the decision of the Court of Appeals of Tennessee, and by written opinion, filed October 3, 1947 (R. 95), and judgment entered and filed on October 6, 1947 (R. 100), the Supreme Court of Tennessee denied Petitioners' application for such writ. The Supreme Court of Tennessee thus refused to take jurisdiction of the case. The Court of Appeals of Tennessee was the highest Court of the State in which a decision could be had in the cause, since the Supreme Court of Tennessee refused to take jurisdiction of said cause.

Petitioners endeavored to have the Supreme Court of Tennessee take jurisdiction of the cause by filing a petition for Certiorari, assignments of error, and supporting brief in that Court (R. 108-121). This was the only method open to them to have the decision of the Court of Appeals reviewed by the highest court of Tennessee (Vol. 6, Williams Tennessee Code Annotated, Sect. 10629).

Petitioners set up and claimed in the cause in both the Court of Appeals of Tennessee and the Supreme Court of Tennessee that they were deprived of a right or an immunity under a statute of the United States, namely the Federal Employers' Liability Act (45 U. S. C. A., Section 51, Act of April 22, 1908, Chapter 149, Section 8, 35 Stat. 65), (R. 101-108; 108-121); which claim, right and immunity were denied Petitioners by the Court of Appeals of Tennessee (R. 82-93).

Cases believed to sustain the jurisdiction are:

Brady v. *Southern Railway Company,* 320 U. S. 476, 88 Law Ed. 239;

Ellis v. *Union Pacific Railroad Company* (decided February 3, 1947) 91 Law. Ed. 433 (Law Edition Advance Opinions February 24, 1947 issue);

Blair v. *Baltimore and Ohio Railroad Company,* 323 U. S. 600, 65 Supreme Court Report 545, 89, Law Ed. 490;

American Railway Express Company v. *Levee,* 263 U. S. 19; 68 Law Ed. 140.

Questions Presented

The questions presented by Petitioners' petition herein for a Writ of Certiorari are:

(1) Whether Respondent was employed in Interstate Commerce by Petitioners at the time he was injured on January 4, 1946, around 10:30 P. M., approximately twenty-eight and one half hours after Respondent's work had ended, within the purview of the Federal Employers' Liability Act (45 U. S. C. A., Section 51, Act of April 22, 1908 c. 149 Section 1, Stat. 65).

(2) Whether Respondent, at the time of said injuries, was engaged in acts incidental to employment by Petitioners in interstate commerce within the meaning of the Federal Employers' Liability Act.

(3) Whether Angelo Jackson, the person who threw the torch on the body of Respondent, causing said injuries, was an employee of Petitioners in interstate commerce within the meaning of the Federal Employers' Liability Act at the time he threw said torch.

(4) Whether the trial of the Workmen's Compensation case under the Tennessee Workmen's Compensation Law and the Federal Employers' Liability case together vio-

lated Petitioners' rights under the Federal Employers Liability Act.

Reasons Relied On for the Allowance of the Writ

I

This action is brought by Respondent under the Federal Employers' Liability Act, section 1 of which is as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect, or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Section 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Section 1, 53 Stat. 1404."
>
> 45 U. S. C. A., S. 51, p. 118.

Neither the term "employer" nor the term "employee" is defined in the Act, but these terms are to be considered as having been used in the Act in their ordinary and natural sense, and according to common law principles as applied to the relationship of master and servant.

Robinson v. *B. & O. R. R. Co.,* 237 U. S. 84, 59 Law Ed., 849;

Bourne v. *Southern Railway* (Supreme Court of N. C., Mar. 7, 1945) 225 N. C. 43; 33 S. E. 2nd 239; 35 Am. Jur. Sec. 432, p. 849.

There is no dispute as to the facts in this case and the question as to whether or not Respondent was an employee of the Petitioners within the purview of the Federal Employers' Liability Act at the time of his injuries, is one of law.

Phila. & Reading Ry. Co. v. *Hancock,* 253 U. S. 284, 64 Law Ed., 907.

The essential and final test in determining whether the master-servant relationship exists, under common law principles, is whether or not the master has the right to control the servant on the occasion under investigation.

35 Amer. Jur. Section 3, page 445 et seq.

As pointed out and set forth in the "Summary Statement of Matters Involved," the work week of Respondent and his group was forty hours. Respondent and his group worked on January 1, 1946, which was a holiday, so that they could finish their work the first week in January, 1946 on Thursday of that week. Accordingly, Respondent and his group completed their work for Petitioners at around 6:00 P. M. Thursday, January 3, 1946, at which time the work for the entire week ended. At that time, the pay of Respondent and the other members of his group stopped.

After 6:00 o'clock P. M. on Thursday, Respondent and the other members of his group were free to go where they pleased and do what they pleased. Petitioners relinquished all control over them at that time. All of them, including their foreman Gus Dober, left their jobs. They were on their own time and not subject to any order of Petitioners. There was no one on the job representing the Petitioners to give them orders since they had broken camp and their foreman had gone, the foreman of the group and twelve members of the group having left for their respective homes on the following Friday morning, January 4, 1946. All matters transacted by Respondent and the other members of his group after they were laid off from work on Thursday were matters personal to themselves. Respondent neither owed to, nor performed any duty for Petitioners after he was laid off from work on Thursday January 3, 1946. Respondent's return to the railroad car where he was injured on Friday night, January 4, 1946 was a matter of his own convenience and of his own choice as there was no duty or obligation upon his part to so return.

The fact that he stated to his foreman, Dober, that "I am going back to Erwin to do a little shopping and sleep in the shanty car tonight," and his foreman replied 'all right," shows that it was not his practice to sleep in the cars on the week end and that when he first left Johnson City he did not plan to return to the Railroad car on the Friday night that he was injured. Neither Respondent, nor any member of his group intended to return to their jobs before the following Monday, January 7, 1946. Respondent may not have returned even if he had not been injured, though he stated that he intended to return. He could have changed his plan as there was no legal duty upon him to return.

If Respondent had failed to return to work on the following Monday morning, but continued to sleep in the railroad car for a period of six or twelve months at his own

convenience and had been injured under similar circumstances as in this case, it could not be plausibly argued that such injury would have been covered by the Federal Employers' Liability Act. The only difference in the hypothetical case and the case under consideration is the time element.

The relationship between master and servant is suspended when the servant leaves the place of his actual employment at the close of the day's work for a destination unless the incidents of his employment are exceptional.

Little v. *Johnson City F & M Company*, 158 Tennessee, p. 102.

The incidents of Respondent's employment were not exceptional as there was nothing connected with said employment which required or obligated him to return to the railroad car on the night he was injured. In fact, he was not expected to do so—such was not contemplated by the parties at the time he was employed. He was expected to go home when released over the week end, else he would not have asked permission of his foreman to remain in the railroad car.

The holdings of the Supreme Court of Tennessee that Respondent was subject to the control of Petitioners at the time he was injured; that he was subject to call in case of an emergency on the night he was injured, and that his injuries resulted from the peculiar conditions of his employment imposed by the Petitioners, are contrary to the evidence in the case.

If Respondent had been injured in the Petitioners' railroad station in Johnson City under the same circumstances as he was injured on the occasion in question, it could not be plausibly said that the master and servant relationship existed and that such injuries were within the contemplation of the Federal Employers' Liability Act. If he had

been injured while staying at a private rooming house under the same circumstances it could not be said that the master-servant relationship existed and that such injuries were within the contemplation of the Act.

It is believed that the holding of the Court of Appeals of Tennessee that Respondent's injuries were covered by the Federal Employers' Liability Act is contrary to the evidence in the case, is in contravention of Federal policy and applicable Federal decisions, and contrary to both the letter and spirit of the Federal Employers' Liability Act.

Respondent was injured in the nighttime, approximately 28½ hours after his work was suspended and if such injuries are covered by the Federal Employers' Liability Act it would seem that injuries to persons anywhere on the line of the railroad, after termination of their work, would also be covered by the Act. It is not believed that it was the intention of Congress for the Act to cover injuries to persons that occur while such persons are not on duty.

Pryor v. *Bishop*, 234 Fed. page 14; *Bishop* v. *Delano*, 265 Fed. 263; *Brwn's Admr.* v. *Norfolk & West. Ry. Co.*, 12 Fed. Rep. 2nd, p. 319.

II

On the day following the Thursday that Respondent and the other members of his group were released from work, Respondent went to Erwin, Tennessee and procured his pay check from his foreman, Dober. After procuring his pay check, he did some personal shopping in some of the Erwin stores and after completing these personal matters visited a friend, Dan Lyon, in Erwin, for a period of several hours. Upon arriving in Johnson City, around 5:00 o'clock in the afternoon, he attended a picture show in Johnson City with three of his friends. It goes without saying that all of these matters were personal to Respondent, and while engaged

in them he was his own master. His return to the railroad car around 10:30 Friday night was of his own volition and about as remote to the duties of his employment as visiting his friend in Erwin, engaging in his personal shopping in Erwin and Johnson City, and attending the picture show. He did not visit the railroad car on Friday night in order to await a call for duty by the petitioners. He was not there to protect the property of the Petitioners. He was not there to receive food, as meals were not served after the work week had closed. He was not there while momentarily off from work during the work week. He was not drawing pay while there. He was not subject to any order of the Petitioners while there. He was not injured at the place where he performed his work. He was not preparing to go to work at the time he was injured. He did not intend to return to work, according to his own statements, for four nights and three days after closing his work week on Thursday, January 3rd. If he had negligently injured some third party in the railroad car on the night he was injured, the Petitioners would not have been responsible for his acts on the theory that he was acting as a servant or agent of Petitioners. His acts at the time of his injury were no more incidental to his employment than the acts of the twelve other members of his group who had gone to their respective homes.

The line of cases which the Court of Appeals of Tennessee followed in concluding that Respondent was engaged in matters incidental to his employment at the time of his injuries, and, therefore, covered by the Federal Employers' Liability Act, is represented by the following: *Erwin* v. *Pa. Ry. Co.*, 36 F. (2d) 937; *Chicago M. St. P. & P. R. Co.* v. *Kane*, 33 F. (2d) 866; *Erie Ry. Co.* v. *Wingfield*, 224 U. S. 170, 61 Law Ed. 1057; *Sassaman* v. *Pa. Ry. Co.*, 144 F. (2d) Page 950; *Va. Ry. Co.* v *Early*, 130 F. (2d) 548.

This line of cases generally involves factual situations which fall into one of the following classifications: (1) Where the servant is actually at the place where he performs his work or is in close proximity thereto and steps aside from his work temporarily to do something incident to life and in so doing is injured. (2) Where the servant is on his way to, or coming from, the place where he actually performs his work, or is being transported to and from his work by his employer under contract. (3) Where the servant is required to remain on the premises of the employer and is subject to call by the master while on such premises. The instant case does not fall in any of these classifications.

Respondent did not return to the car on the night of his injury by reason of any duty or order of Petitioners, but solely as a matter of choice and was not subject to the control of Petitioners. It is believed that the holding of the Court of Appeals that Respondent at the time of his injury was engaged in matters incidental to his employment within the meaning of the Federal Employers' Liability Act is unsupported by the evidence in the record and in contravention of the meaning of the Federal Employers' Liability Act and the applicable Federal decisions.

III

Angelo Jackson discontinued his work with the Petitioners at the same time that Respondent's work was discontinued, namely, Thursday, January 3, 1946, at around 6:00 o'clock P. M. Hence, he was using the railroad car at the time Respondent was injured on the same basis and under the same circumstances that Respondent was using it. The use of this car by them was simply permissive on the part of the Petitioners. Since Respondent was not engaged in work for the Petitioners at the time of his injuries,

it necessarily follows that Angelo Jackson was not a fellow servant of Respondent at that time.

Reeve v. *Northern Pac. Ry. Co.* (Washington Supreme Court) 144 Pac., 63, L. R. A. 1915 C p. 37.

The holding of the Court of Appeals of Tennessee that Angelo Jackson was a fellow servant of Respondent at the time of the accident is contrary to the evidence and believed to be in conflict with applicable federal decisions.

IV

In the Workmen's Compensation case, negligence was not a necessary element and the right of action was triable by the Court alone and was based upon a State Statute and appealable to the Tennessee Supreme Court. (Vol. 4, Williams Tennessee Code, Sections 6852, 6855). The Federal Employers' Liability case was based upon alleged negligence and was triable by a Court and Jury and appealable to the Court of Appeals of Tennessee. ((Vol. 6, Williams Tenn. Code, Sec. 10618). Thus the Trial Court forced Petitioners to try a case triable before the Court without a Jury with a case triable before the Court and a Jury and each case appealable to a different Court. It is believed that the Court, in requiring Petitioners to try the two cases together, violated Petitioners' rights and immunities under the Federal Employers' Liability Act and that such action is in contravention of federal policy and federal decisions.

Prayer of Petitioners

Wherefore, Petitioners pray, that a Writ of Certiorari be issued by this Honorable Court, directed to the Court of Appeals of Tennessee, Eastern Section, sitting at Knoxville, Tennessee, to the end that the decision and judgment of the Court of Appeals of Tennessee in said cause, Atlantic Coast Line Railroad Company and Louisville and Nash-

ville Railroad Company, doing business as *Clinchfield Railroad Company, Plaintiffs-in-Error,* vs. *Dock L. Meeks,* by next friend, Ada Foney, Defendant-in-Error, Law Cause Number 2, from the Law Court at Johnson City, Tennessee be reviewed by this court, as provided by Law, and that upon such review said decision and judgment be reversed, and that Petitioners have such other, further and general relief as to this Court may seem appropriate.

Dated: December 22, 1947.

ATLANTIC COAST LINE RAILROAD COMPANY AND LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Doing Business as Clinchfield Railroad Company,
Petitioners,

JAMES J. McLAUGHLIN,
217½ East Main Street,
Johnson City, Tennessee,
ROBERT L. TAYLOR,
217½ East Main Street,
Johnson City, Tennessee,
JAMES H. EPPS, JR.,
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COX, TAYLOR, EPPS and MILLER,
217½ East Main Street,
Johnson City, Tennessee,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 487

ATLANTIC COAST LINE RAILROAD COMPANY AND LOUISVILLE AND NASHVILLE RAILROAD COMPANY, DOING BUSINESS AS CLINCHFIELD RAILROAD COMPANY, *Petitioners,*

vs.

DOCK L. MEEKS, BY NEXT FRIEND, ADA FONEY, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of the Court Below

The opinion of the Court of Appeals of Tennessee in said cause of *Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, Plaintiffs-in-Error,* vs. *Dock L. Meeks,* by next friend, Ada Foney, Defendant-in-Error, which Petitioners here seek to have reviewed is not officially reported but appears on pages 82-93 of the record filed herewith. Neither is the opinion of the Supreme Court of Tennessee, in which that Court refused to take jurisdiction of the case, reported, but appears on pages 95-100 of the record filed herewith.

Statement of the Case

The essential facts of the case are believed to be fully stated in Petitioners' petition for Writ of Certiorari, and in the interest of brevity it is not believed necessary to restate such facts herein, except by referring to them in the course of the argument which will follow.

Specifications of Error to Be Urged

The Court of Appeals of Tennessee, in its opinion in said cause, erred:

(1) In holding and deciding that there was material evidence presented to the Jury wherein the Jury could find that the relation of employer and employee or master and servant existed between Petitioners and respondent at the time of Respondent's injuries.

(2) In holding and deciding that Respondent was engaged in matters incident to his employment in interstate commerce and, therefore, covered by the Federal Employers' Liability Act.

(3) In holding and finding, in effect, that Angelo Jackson, the person who threw the torch on the body of Respondent that caused his injuries, was an employee of Petitioners in interstate commerce within the meaning of the Federal Employers' Liability Act at the time he threw said torch.

(4) In holding and finding that the action of the Trial Court in trying the Workmen's Compensation case and the Federal Employers' Liability case together was proper.

(5) In affirming the verdict of the Jury in the amount of $15,000.00 in favor of Respondent, and the judgment of the Trial Court rendered thereon.

(6) The Supreme Court of Tennessee erred in denying Petitioners' application for Writ of Certiorari and thereby

refusing to take jurisdiction of the cause and, in effect, approving the opinion of the Court of Appeals.

Summary of Argument

(1)

The evidence adduced at the trial of said cause of Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, doing business as Clinchfield Railroad Company, vs. Dock L. Meeks, by next friend Ada Foney, on the question of the relationship of the Petitioners and Respondent at the time of Respondent's injury was undisputed. Respondent was the only witness who testified on this point and the question of whether such employer-employee relationship existed at the time of the injury was a question of law for the Court and not a question for the determination of the Jury and the Court of Appeals erred in failing to hold that Respondent was not an employee of Petitioners in interstate commerce within the purview of the Federal Employers' Liability Act at the time Respondent sustained his injuries.

Phila. and Reading R. R. Co. v. *Hancock,* 253 U. S. Pages 283, 285, 64 L. Ed. pages 907, 908.

Brady v. *Southern Railway Company,* 320 U. S. 476, 479, 88 L. Ed. 239, 243.

(2)

The evidence adduced at the trial in this cause showed that Respondent was not engaged in matters incident to any employment in interstate commerce by Petitioners within the purview of the Federal Employers' Liability Act at the time of his injuries, but was engaged in matters personal to himself and that his injuries occurred many hours after the employer-employee relationship had been suspended

between him and Petitioners, and the Court of Appeals erred in failing to so hold.

Bourne v. *Southern Railway Company* (Supreme Court of N. C., decided March 7, 1945), 225 N. C. page 43, 33 Southeastern 2nd, pages 239, 241, 242.

Pryor v. *Bishop,* 234 Federal, pages 9, 14, 15;

Bishop v. *Delano,* 235 Federal, pages 263, 264;

Brown's Administrator v. *Norfolk & Western Railway Company,* 12 Federal 2nd, pages 319, 321;

Karsaik v. *Pennsylvania R. R. Co.,* 270 Fed. 758;

Brown v. *Pere Marquette Railroad Company* (Michigan Supreme Court), 213 N. W. 179, 71 A.L.R. 858-859.

35 Amer. Jur., Sect. 440, page 855;

Volume 2, 2nd Edition Roberts Federal Liabilities of carriers, Section 739, page 1401.

(3)

The evidence adduced at the trial in this cause showed that Angelo Jackson, the person who threw the torch on the body of Respondent that caused his injuries, was not a fellow-employee of Respondent in interstate commerce within the meaning of the Federal Employers' Liability Act at the time he threw said torch, and the Court of Appeals erred in failing to so hold.

Reeve v. *Northern Pacific Railroad Company* (Washington Supreme Court), 144 Pacific, page 63, L.R.A. 1915, c. page 37;

Wood, Master and Servant, Section 435.

(4)

The Court of Appeals erred in not holding that the Trial Court erred in trying the Tennessee Workmen's Compensation case and the Federal Employers' Liability case at

the same time. The Trial Court should have required Respondent to elect which of the cases he would try first, and the Court of Appeals erred in failing to so hold.

Hudgins v. *Nashville Bridge Company,* 172 Tennessee page 580.

(5)

This Court, on Certiorari, is not confined to a consideration of the evidence referred to by the State courts in their opinions, but will review the entire record and determine for itself whether Petitioners were denied a Federal right or Federal immunity by the opinions and judgments of the courts below.

G.N.R. Co. v. *State of Washington,* 300 U. S. 154, 81 L. Ed. 573;

United Gas Public Service Company v. *State of Texas,* 303 U. S. 123, 143, 82 L. Ed. 702;

Chicago, G. W. R. Co. v. *Rambo,* 298 U. S. 99, 80 L. Ed. 1066.

Argument

This is an action under the Federal Employers' Liability Act, the material part of which is cited in Petitioners' petition for Certiorari, page 16 thereof.

The portions of such Act which are pertinent to the questions under consideration are:

> "Every common carrier by railroad, while engaging in commerce between any of the several states or territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, to his or her personal representative . . ."
>
> (45 U. S. C. A., Sect. 51, Act of April 22, 1908, C. 149, Sect. 1, 35 Stat. 65.)

The pertinent provision of the August 11, 1939 amendment to the Act is as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."
>
> (45 U. S. C. A., Section 51, August 11, 1939, Chapter 685, Section 1, 53 Stat. 1404.)

The Act does not itself define the meaning of the word "employee," or the word "employer" used in said Act, but such words have been interpreted and understood in their ordinary sense and according to their usage in the law of master and servant.

Robinson v. *B. & O. R. R. Co.*, 237 U. S. 84, 59 Lawyers' Edition 849;

35 Amer. Jur., Sect. 432, page 849.

The above-quoted portion of the 1939 amendment to the Act broadens the Federal remedy. Prior to this amendment there were many close and difficult situations from which to determine whether or not the employees' work was a part of interstate commerce at the time of his injuries, and to avoid these difficulties was one of the purposes of this amendment. (*Erwin* v. *Pa. R. R. Co.*, 36 Fed. Supp. 937, 940). Under the amendment an employee of a railroad company whose general duties are partly in intrastate commerce and partly in interstate commerce is covered by the Act if he is injured while performing such duties. Prior to the amendment, it was necessary for the employee to be

engaged in a task in interstate commerce at the time of his injuries in order to be covered by the Act.

Erie Railroad Co. v. *Welsh*, 242 U. S. 303, 61 Law. Edition 319.

Although the 1939 Amendment materially broadens the Federal remedy of the injured party, it does not make parties employees of the railroad who were not employees prior to the passage of such amendment. In order, therefore, for a person to come within the purview of the Act, as amended, it is necessary for such person to be "employed by such carrier in such commerce" at the time of his injuries, or engaged in matters incidental to his employment in interstate commerce.

I

Respondent was not injured while employed by Petitioners in interstate commerce within the purview of the Federal Employers' Liability Act, nor was respondent injured while engaged in matters incidental to employment by Petitioners in interstate commerce.

It is submitted that the Court of Appeals erred in holding that there was sufficient evidence to submit to the Jury on the question of whether or not the employer-employee relationship existed between the parties within the meaning of the Federal Employers' Liability Act at the time Respondent was injured.

The group in which Respondent was working disbanded on Thursday, January 3, 1946 to go to their homes for the week end and Respondent was not injured until Friday night around 10:30 P. M., January 4, 1946. Respondent intended to catch the Friday morning train for his home and the only apparent reason for not carrying out his purpose was his desire to return to Johnson City to do some

shopping. He was not only not required to return to Johnson City and stay in the railroad car on the night he was injured, but was not expected to so return. He had no duty to perform for Petitioners when he returned to Johnson City. It was neither his practice nor that of any other member of his group to stay in the railroad cars on the week ends, and Petitioners did not contract with them to stay in the railroad cars on the week ends. This is shown by the following portion of Respondent's testimony:

> "Q. Let me see if I understand you. You got off from work Thursday at six o'clock?
>
> A. Yes, sir. The reason I got off from work Thursday, six o'clock, we worked on—the year 1946 come in, I think that was a holiday.
>
> Mr. Taylor: That's right.
>
> The Witness: *We worked on that day, that throwed us to go home on Thursday or Friday—I mean work up to Thursday and go home on Friday. We had been going home on Saturday*" (R. 63, 64). (Emphasis ours.)

Respondent received his check on Friday morning in time to catch the train for his home. This fact is shown by the following portion of his testimony:

> "Q. Your boss man?
> A. Yes, sir, Gus Dober.
> Q. Where did he give you your checks?
> A. Down at the depot.
> Q. At the depot?
> A. Yes, sir.
> Q. In Erwin, Tennessee?
> A. That's right.
> Q. Had the train gone then?
> A. No, sir.
> Q. It hadn't gone?
> A. No, sir.
> Q. It hadn't gone?
> A. No, sir.
> Q. Did Mr. Dober go on the train?

A. Yes, sir.

Q. Gave you your check and Sellers and the other boys got their checks too?

A. Yes, sir. We told them we were going to stay in the shanty car.

Q. You told that to Mr. Dober?

A. Yes, sir.

Q. You came back from Erwin that morning how, to Johnson City?

A. Caught a bus" (R. 58).

His return to Johnson City was solely for the purpose of engaging in personal matters. This is clearly shown by his testimony as follows:

"Q. After you got your check you say you were coming back to Johnson City?

A. Yes, sir, I come back and did some shopping.

Q. To do some shopping?

A. Yes, sir, but I went to Erwin that day at that store and had my check cashed.

Q. At the Unaka Store?

A. Yes.

Q. Had your check cashed?

A. Yes, sir.

Q. Friday morning?

A. Yes, sir—not Friday morning, it was right when the train went—that's right, Friday morning" (R. 56, 57).

Respondent was not working on the night he was injured and Petitioners had no control over him; no more control than if he had been in one of their railroad stations. He was not on duty and was not doing anything for the benefit of Petitioners. He was in the railroad car on the night he was injured as a matter of choice and free from any obligation or any order of Petitioners.

Respondent was not subject to call on the night he was injured, neither was any other member of his group. He

would not have been subject to call unless and until he returned to work on the following Monday morning, January 7, 1946, if he returned at that time, any more than a third party might have been if employed for the first time on Monday morning. The fact that Petitioners did not object to Respondent staying in the railroad car on the night he was injured did not restore the employer-employee relationship within the meaning of the Federal Employers' Liability Act, after it was suspended on Thursday, January 3rd.

There must be substantial and material evidence before a case may properly be submitted to the Jury. It is submitted that there was no material evidence to submit to the Jury on the question of whether or not Respondent was employed by Petitioners in Interstate Commerce at the time of his injuries.

When the evidence is such that without weighing the credibility of witnesses there can be but one reasonable conclusion as to the verdict, the Court should direct the verdict. A motion was made by Petitioners for a directed verdict in their favor at the conclusion of all proof, but this motion was overruled (R. 69-70).

It is respectfully submitted that the Court of Appeals committed grievous error in not reversing the action of the Trial Court on this point.

> ". . . But when a state's jury system requires the Court to determine the sufficiency of the evidence to support a finding of a federal right to recover, the correctness of its ruling is a federal question. The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury (Citing cases). When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding

by non-suit directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims (Citing cases)."

Brady v. *Southern Ry. Co.* (Decided December 20, 1943), 320 U. S. 476, 479, 88 L. Ed. 239, 243.

When the essential facts are not in controversy, the relationship of the parties, within the meaning of the Federal Employers' Liability Act is a question of law.

In the case of *Philadelphia and Reading Railroad Company* v. *Hancock*, 253 U. S. page 283, 285, 64 Law Edition pages 907, 908, this Honorable Court said:

"If when the accident occurred, the husband was employed in commerce between states the challenged judgment must be reversed. And he was so employed if any of the cars in his train contained interstate freight (Citing cases). The essential facts are not in controversy; the nature of the employment therefore is a question of law."

In the case of *Pryor* v. *Bishop* (1916—Circuit Court of Appeals, Seventh Circuit), plaintiff, a member of a train crew, subject to call for an interstate trip, was injured in one of the company's cabooses, while waiting for the call for work. The Court in holding that plaintiff was not an employee of the company within the meaning of the Federal Employers' Liability Act said in part:

"Assuming that the court correctly held that the jury in the Moyse Case was justified in finding the relation of master and servant actually to exist at the time of the injury, it is to be noted that this was based upon the finding of a contractual right as well as a duty to be in the caboose at the time. Moyse was there pursuant to a definite obligation and, even though merely awaiting a call, might be held to be acting as an employee in

so occupying the caboose. In the instant case, however, there was no such duty; the deceased could as well have been at a city hotel; his only duty at the time was to be within call, either personal or telephonic. That he was on the company's property at the time of the injury was due, not to an obligation, but to a privilege, a license; in being there, he was acting, not as an employee, but as a licensee."

"If, however, he could be deemed to be in the employment of the company at the time of the injury, nevertheless he was not then actually employed in interstate commerce. His actual employment at the time was holding himself ready in the City of Chicago to respond to a call for service. That the call, when it came, would be for an interstate trip, does not make the waiting in Chicago an actual engagement in interstate commerce, within the terms of the federal act."

"Plaintiff's claim that, by the hitching on of the caboose in question to the transfer train, decedent's crew was called, and that his interstate service had thus actually begun, does not commend itself to our judgment. It was not, nor was it intended as such. Clearly the crew had not started with the caboose upon their home run. Neither does it appear from the evidence that the caboose and train crew were at the place of the injury for the benefit of defendant, or that they were wanted there at the time, or that there was any understanding that they should be at Landers at or near that time, or that they were at the place of the accident with other right than the mere sufferance of defendant, that being the most convenient way for them to get to Landers and secure sleep and other accommodations for the night, or that they were under any expectancy of a call, or that their acts in the premises had any bearing upon interstate commerce, or that the facts of the case brought the decedent within the provisions of the Federal Employers' Liability Act."

* * * * * * *

"To hold that decedent was, at the time of the injury—some 4 or 5 hours before he was wanted by defendant—employed in interstate commerce, would practically make the defendant liable to him as engaged in interstate commerce at all times. Such is not the purpose of the act. The statute was enacted only with reference to those railroad employees who, while in the actual discharge of their duties in interstate commerce, are injured."

"Pryor *v.* Bishop, 234 Fed. Rep. 9, pp. 14-15."

On a second appeal the Court again said:

"Though the defendant knew that Bordner, if he chose, might stay in the caboose during his free period, his doing so was not a requirement of his service. We see no larger ground of liability than if the defendant had permitted Bordner during his time of nonservice to sleep in a station building, and he had there been killed through the negligence of defendant's servants."

Bishop v. *Delano* (1920), 265 Fed. Rep. 263, 264.

In the case of *Brown's Adm'r* v. *Norfolk & W. Ry. Co.*, 12 Fed. Rep. 2nd, p. 319, the Court said:

"The distinction between the Krysiak Case and the Zachary Case seems to be this: After the end of the day's work the act of the employee must be a necessary incident of his work, or he is no longer employed within the meaning of the Employers' Liability Act. But, if the act of the employee occurs at a rest interval during the day's work, the status of the employee is not changed, if the act done is, in intent, not inconsistent with the employee's duty to resume his work at the appointed time. See Erie R. Co. *v.* Winfield, 244 U. S. 170, 173, 37 S. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662."

In the case of *Little* v. *Johnson City F. & M. Company*, 158 Tenn., page 102, the Tennessee Supreme Court quoted

with approval the following language from the Massachusetts Supreme Court:

> "The principle is carefully stated by the Massachusetts Court as follows:
>
> 'Unless the incidents of employment be exceptional, the relation between a master and his servant is suspended when the servant leaves the place of his actual employment at the close of his day's work to go to his home, and again becomes active when after the interval of rest, the laborer puts himself in a position where he can do the work of his employment at the place where it is to be performed. Langley *v.* Boston Elevated R. Co., 223 Mass. 492, 112 N. E. 79, Rourke, Claimant (Mass.), 129 N. E. 603, 13 A. L. R. 546.'
>
> "We see nothing in the facts of this case to take it out of the general rule. It appears that the employee was ordered to return somewhat earlier on the morning he was hurt, perhaps because of extra work, than he usually reported for duty. His relation with his employer was to be resumed on the particular day at an earlier hour than usual. Such relation, however, had not been resumed and the employee was still on the public highway when he was injured. His injury did not arise out of his employment nor in the course of his employment, but during the suspension of his employment. The employee was to work a longer time on the day he was hurt, than was his custom, and he would have gotten more pay. It seems, therefore, that his early return to work, even under the orders of the employer, was an immaterial circumstance in this case."

The Court held in the case of *Karysaik* v. *Penn. R. R. Co.*, 270 Fed. 758, that an employee working in an ash pit in railroad yards who, on leaving his work, instead of taking the stairway to the street provided by the railroad company, for his own convenience walked across the yards and tracks as other employees did, following no confined way, was

struck and killed by train on main track, had ceased his employment and was not covered by the Federal Employers' Liability Act.

In the case of *Brown* v. *Pere Marquette R. Co.* (Mich. Supreme Court), 213 N. W. 179, 71 A. L. R., 854, the Court held that a railroad brakeman asleep in the caboose of a freight train on the completion of sixteen hours continuous service, is not "on duty" within the meaning of Federal Hours of Service Act so as to entitle him to recover under the Federal Employers' Liability Act for injuries sustained when a train collides with the caboose, although he has not been relieved from duty by any order from the superintendent or train dispatcher. In so holding the Court said in part:

> "It is urged that the plaintiff was not relieved by any order from the superintendent or train dispatcher. But a man does not have to receive an order to quit work when his hours of daily service have expired. The plaintiff knew this. He did not inquire of the conductor, his superior in the operation of the train, whether any further or other service was required of him. He treated the statute and the notice of the superintendent "as a command, and in obedience thereto he left the engine, where his duty, if at work, required him to remain, and went to the caboose and made up his bed and lay down upon it and went to sleep. In our opinion, he was not on duty at the time the collision occurred, and the defendant's motion for a directed verdict should have been granted." 71 A. L. R., pp. 858-859.
>
> *"The class of railroad employees known as train crews frequently lodge, sleep and eat in their way cars in railroad yards during hours off duty after the termination of their outgoing 'runs' and before the commencement of their return trips, their status while thus off duty with reference to interstate employment is not altered by the fact that they procure their rest and sleep on the master's premises and in his equipment.*

For example, it has been held that train crews while asleep in their way cars in railroad yards between trips are not employed in interstate commerce'' (Vol. 2, 2nd Ed., Roberts' Federal Liabilities of Carriers, Sec. 739, p. 1401). (Emphasis ours.)

The case of *Bourne* vs. *Southern Railroad Company,* 225 N. C. 43; 33 S. E. 2nd 239 involved a claim under the Federal Employers' Liability Act for a death which occurred on one of the routes of the Southern Railroad Company while the employee was familiarizing himself with such route. The deceased had worked for the Southern Railroad many years before his death but had never operated a train on the line where he was killed. The Supreme Court of North Carolina in affirming the decision of the Trial Court in denying liability said in part:

''The exception to the judgment as of nonsuit, entered by the Court below, cannot be sustained unless each of the following questions can be answered in the affirmative: 1. Was plaintiff's intestate, at the time of his death, an employee of the defendant? 2. If so, was he acting within the scope of his employment? 3. Was the defendant engaged in transporting goods in interstate commerce at the time of the death of plaintiff's intestate?

''The plaintiff is not entitled to recover, under the Federal Employers' Liability Act, unless her intestate at the time of his death was an employee of the defendant, acting within the scope of his employment and the defendant at the time was engaged in interstate commerce. (Citing numerous cases.)

''In considering the first question, it will be noted the Federal Act does not define the word 'employer' or the word 'employe', hence they are to be considered as having been used in the Act in their natural and ordinary sense. (Citing numerous cases.) The Act, 'being remedial, is to be liberally construed to advance the remedy proposed, but it applies only when the re-

lation of master and servant exists.' (Citing numerous cases.)

"The fact that plaintiff's intestate was an engineer employed by the Southern Railway Company to operate an engine over the Asheville-Murphy Branch, between Asheville and Bryson City, and had been so employed for a long time prior to April 7, 1941, does not necessarily establish the relation of master and servant between him and the defendant at the time of his death. The evidence on this record establishes the fact that plaintiff's intestate was riding the engine on train No. 17, on April 7, 1941, pursuant to a permit issued by the company, in order that he might qualify for a position as engineer on that part of the Asheville-Murphy Branch, between Bryson City and Murphy. He was in no sense a student engineer. He was an experienced engineer and had been employed by the Southern Railway Company for approximately eighteen years. He needed no instructions in the operation of an engine. He was present for one purpose and one purpose only—'to learn the road.' For it is admitted that he 'was riding said engine for the purpose of acquainting himself with the road, the curves, sidings and any changes that had been recently made in connection with the roadbed.' If he had been qualified and authorized to operate the engine, under the rules of the company, it would have been unnecessary for him to obtain a permit and make this trip, in order to become eligible for assignment as an engineer on that part of defendant's road.

* * * * * * *

"We do not think, under the facts presented on this record, plaintiff's intestate was an employee of the defendant on April 7, 1941, within the meaning of the Federal Employers' Liability Act, *but at most was a licensee under and by virtue of his permit. He had no duties to perform for or on behalf of the company in connection with the operation of the train, and the engineer was without authority to engage his services for any purpose, except in case of an emergency.* (Cit-

ing case.) The rules of the company with which plaintiff's intestate was familiar, provided that the regular engineer, while on duty, must not leave his engine except in case of necessity, and then only in care of the fireman. The evidence shows no necessity or emergency requiring the absence of the regular engineer. Furthermore, there is no evidence to the effect that plaintiff's intestate was "was to receive any compensation or other return for making the trip, save and except the information he would obtain for his own benefit.

"Moreover, conceding but not deciding, that plaintiff's intestate was an employee, we *think* the second question presented should also be answered in the negative. For, as stated in 34 Am. Jur., Sec. 437, p. 852: 'It may be conceded that one has no claim of the breach of a duty charged upon the employer by the Employers' Liability Act where it appears that the employee was in fact injured while acting outside the scope of his employment, as where he is injured while voluntarily assuming to do something that the employer did not employ him to do.' (Citing numerous cases.) In the instant case it will be noted that plaintiff does not even contend that her intestate was employed to do what he did do. We think his very presence on the engine under a permit, obtained for the purpose of observing the road, is evidence of the fact that he was not authorized by the defendant to act as engineer on that trip. He knew he was without authority under the express rules of the company to assume the duties of the engineer at the time and place he did assume them. Hence, the defendant is not answerable in damages for his death under the provisions of the Federal Employers' Liability Act" (33 S. E. 2nd, pp. 241-242). (Emphasis ours.)

II

Angelo Jackson was not a fellow servant of Respondent at the time Respondent was injured.

Angelo Jackson discontinued his work with the Petitioners at the same time Respondent's work was discontinued, namely, Thursday January 3, 1946, at around six o'clock P. M. Hence, he was using the railroad car at the time Respondent was injured on the same basis and under the same circumstances that Respondent was using it. The use of this car by them was simply permissive on the part of Petitioners. Since Respondent was not engaged in work for the Petitioners at the time of his injuries, it necessarily follows that Angelo Jackson was not a fellow servant of Respondent at that time.

> ". . . To permit the application of the fellow-servant doctrine, the injured servant must at the time of the injury not only be serving the same master, but be engaged in the same employment with the negligent servant who caused the injury." Wood, Mast. & Serv., Sec. 435.

In the case of *Reeve* v. *Northern Pacific Railway Company,* Washington Supreme Court, 144 Pac. 63 L. R. A. 1915 C, p. 37, plaintiff, an employee of the railroad company, was injured while wrestling with another employee of the railroad company in one of the railroad company's cars. The car was engaged in interstate commerce. Suit was brought under the Federal Employers' Liability Act to recover damages for the injuries. The Court in holding that the employee who injured plaintiff was not a fellow servant said in part:

> ". . . To render the carrier liable the negligent act must occur while the employees are doing some act required in the prosecution of the carrier's business.

" 'For the employer to be held liable, in damages, for an injury to an employee, the injury must not only arise out of, but it must also occur "in the course of," the employment. If the employee, instead of attending to the business of the employer, at the time of the injury, was engaged upon some business of his own, or if the work done by him was outside the scope of his employment, and as a result of the performance of such outside duties he was injured, then the employer is not responsible, for in the performance of such duties the relation of employer and employee did not exist, since he was not employed to perform any such service. And not only is an employee himself precluded from recovering for an injury, where he had voluntarily abandoned his service of his employer and engaged himself upon some independent business, but his employer is not responsible for any injury that he may occasion other employees while so engaged upon such outside business, for, to render the employer liable for injuries caused by his employees, the act that caused the injury must have been done in the scope of the employees' duties for the employer.' White, Personal injuries on Railroads, Sec. 227.

"It remains to inquire whether the injury here suffered by the appellant was the result of a negligent act of a fellow employee committed while he was in the prosecution of the employer's business. Clearly it was not, and is not so claimed by the appellant. The liability is rested on the broad wording of the statute, which, as we say, was not intended to cover negligent acts of an employee in no way connected with the business the prosecution of which he was employed to aid." L. R. A. 1915 C, p. 37 (38).

III

The Court of Appeals erred in failing to hold that trying the Tennessee Workmen's Compensation case and the Federal Employers' Liability case together was error.

It is believed that the Federal Employers' Liability Act contemplates the trial of cases arising under the provisions of said act separately from the trial of cases based on statutory provisions of the various States. Particularly is this so in a case based upon a state statutory provision that is tried before a court without a jury, as was the *Workmen's Compensation* case that was tried at the same time the instant case was tried. It is most difficult to try two cases at the same time, especially where one of them is to be decided by the Court, and is not based upon negligence, and the other is to be decided by the Jury under the instructions of the Court, and is based upon negligence. It is submitted that the trial of the two cases together, one of them appealable directly to the Court of Appeals of Tennessee, and the other directly to the Supreme Court of Tennessee, is contrary to the letter and spirit of the Federal Employers' Liability Act.

IV

Cases Cited by Court of Appeals of Tennessee Distinguished

The Court of Appeals cited and stressed the case of *Virginian Railway Company* v. *Early* (Circuit Court of Appeals, 4th Circuit) 130 F. (2d) page 548, in support of its holding that Respondent was injured while engaged in matters incident to his employment at the time of his injuries. In that case the railroad machinist, after arriving at machine shop about twenty minutes before starting to work, proceeded to lunch room maintained by the railroad for convenience of its employees to obtain a cup of coffee

and while returning to work he reached a point 200 feet from the machine shop where he was to enter upon his work, when he was injured by escaping steam from a railroad engine on nearby track. The Court held that the machinist was injured while acting in his capacity as an employee of the railroad and within the scope of his employment. In the course of the opinion, the Court said:

> ". . . it can be truly said that he was on his way to work when the accident occurred . . ." (Page 551).

That case is distinguishable from the case at bar upon the grounds: That the machinist was on his way to work and was preparing to go to work at the time of the injury. If he had not been injured he would have been on the job within five or ten minutes after said injury. In the instant case, Respondent was not on his way to work or engaged in preparation for work.

The case of *Chicago M. St. P. & P. R. Co.* v. *Kane,* 33 Federal 2nd, 866 was also cited by the Court of Appeals. In that case, the employee, while passing from his bunk on a sidetrack to an outhouse maintained by the railroad for its employees, was killed by steam from an engine upon the tracks where he worked. The employee and other members of his crew were informed at breakfast hour, about 6:45, that they were to go to work at 8:00 o'clock. The accident happened before the work hour arrived. The Court, in holding that the injury was covered by the Federal Employers' Liability Act said in part:

> "By the conditions of his employment, he was necessarily on appellant's premises, *and was making necessary preparations for the work* in which he was to engage an hour and a half later, *in a reasonable manner and within a reasonable time.*" 33 Fed. Rep. 2nd, p. 868. (Emphasis ours.)

The *Kane* case may be distinguished from the case at bar in a number of ways: (a) Kane was on the premises where

he actually performed his work and was making necessary preparations to go to work. Respondent was not on the premises where he actually performed his work at the time he was injured, but was in a box car near the post office in Johnson City, while he actually performed his work on the side tracks of the defendants near the Soldiers Home in Johnson City; (b) Kane was making necessary preparations for the work he was to engage in an hour and a half later. Respondent was not making any preparations for work, but intended to go home the day following his injuries. He had been off from work approximately twenty-eight and one-half hours and did not intend to return to work until the following Monday, January 7. The circumstances under which Respondent was injured were no more incidental to his work than his going to the picture show in Johnson City. Had he not passed up the opportunity to go to his home on Friday, January 3, along with a number of other members of his crew, including his boss, he would not have gone to the picture show in Johnson City. It is respectfully submitted that the holding in the *Kane* case is in no way controlling of the case at bar.

The case of *Erwin* v. *Pennsylvania Railroad Company* (District Court, E. D., N. Y.), 36 Federal Supplement 936, was also cited. In that case a brakeman was employed as a member of shifting crew in moving from one place in the state to another place in the same state dead engines which were then to await repair, but which were theretofor and thereafter used and to be used in interstate commerce. The brakeman was injured while engaged in such work. The Court held that his injuries were covered by the Federal Employers' Liability Act.

The *Erwin* case may be distinguished from the case at bar upon the ground that Erwin was at work at the time of his injuries and as stated by the Court:

> "The question to be answered is whether or not the Plaintiff at the time of his accident, was employed in

> interstate commerce within the purview of the Federal Employers' Liability Act as amended by the Act of Congress, approved August 11th, 1939 . . ." (Page 939).

In the instant case Respondent was not at work. Respondent was not engaged in Petitioners' business at the time of his injuries.

Erie R. R. Co. v. *Winfield* (1917), 224 U. S. 170, 61 L. Ed. 1057, is likewise cited. In that case an employee of an interstate carrier in charge of a switching engine was killed while leaving the yards of the carrier after his day's work, which had included employment in intrastate and interstate commerce. The Court held that the employee was engaged in interstate commerce at the time of the accident within the meaning of the Act. In the course of the opinion the Court said:

> "In leaving the carrier's yard at the close of a day's work the deceased was but discharging a duty of his employment . . ." (U. S., p. 172, L. Ed. 1065).

It is clear that this case is not controlling of the case at bar.

The case of *North Carolina R. R. Co.* v. *Zachary* (1913), 232 U. S., p. 248, 58 L. Ed., p. 591, is cited. In that case a railroad fireman after inspecting, oiling and firing his engine for the intrastate haul of a train containing some cars that had come from another state, was killed by a switching engine while he was attempting to cross the tracks intervening between the engine and his boarding house. The Court held that he was covered by the Federal Act. The Court said:

> "Assuming (what is not clear) that the evidence fairly tended to indicate the boarding house as his destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just pre-

pared his engine for the purpose, and that he had not gone beyond the limits of the railroad yard when he was struck. There is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still 'on duty,' and employed in commerce, notwithstanding his temporary absence from the locomotive engine."

Thus it is shown that the deceased in the *Zachary* case was engaged in work for his employer at the time he was killed. The principle announced by the Court in that case is not in conflict with the contentions being made by the Petitioners in the case at bar.

The case of *Brock* v. *Chicago R. I. & P. Ry. Co.* (Supreme Court of Missouri, 1924), 226 S. W., p. 691, 305 Mo. 502, is cited. In that case the employee was injured during the noon hour. "He had just returned from his work to the bunk car occupied by him and five other men for the purpose of eating his noon day meal in the car adjacent, provided by the defendant for that purpose. Finding that the water in his car had been used up by the others, plaintiff took a bucket and started to bring water from a well which was north of the tracks of defendant and in a northwest direction from his bunk car" (p. 692). He was struck by a passing train while going to get the water. The Court held:

> "The getting the meal at the place and under the circumstances cannot be held to be a severance of the relation (referring to master-servant relation), but a required and regular incident to it" (p. 697).

The holding in the *Brock* case is in accord with the general rule that an employee, while at the place where he actually performs his work, who temporarily steps aside from his work to do something necessary to life, namely, to get food or water, or to respond to the call of nature, does not act beyond the scope of his employment in so doing; that

such acts are incidental to the employment and within the contemplation of both the employer and employee.

V

Authorities cited by Court of Appeals of Tennessee in support of its holding that the issues were for the jury are distinguishable from the instant case.

A portion of the language used by the Court of Appeals in concluding that the relationship of employer and employee existed between the parties at the time of Respondent's injuries within the purview of the Federal Employers' Liability Act is as follows:

> "The debatable qualities of these issues, the fact that fair-minded men might reach different conclusions emphasizes that these present questions which should be properly left to the jury . . . (citing cases) (R. 146, 147.)

The quoted language appears to be practically the same as the language used by this Honorable Court speaking through Mr. Justice Douglas in the case of *Bailey* v. *Central Vermont Railroad Company,* 319 U. S. 350, 352, 87 Law Ed. 1444, 1447, when he said:

> "The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasizes the appropriateness of leaving the question to the Jury."

It is not believed that the quoted language used by the Court of Appeals is applicable to the case under consideration. In the *Bailey* case, the employee was injured while actually at work and the question of negligence was the principal question involved. The Court held that the facts presented were sufficient to present to the jury the question of negligence or lack of negligence upon the part of the railroad company.

The determinative questions in the instant case are whether or not the employer-employee relationship existed within the meaning of the Federal Employers' Liability Act at the time of the inquiries, and if so, whether or not Respondent was engaged in matters incidental to his employment in interstate commerce.

Milburn v. *Chicago M., St. P. & P. R. Co.*, 56 S. W. (2nd), 80 (Supreme Court of Missouri in 1932) is also cited. The Court of Appeals of Tennessee in the instant case appears to have patterned its findings of fact after the findings of fact in the *Milburn* case, but it is not believed that the facts in the two cases are the same.

In the *Milburn* case, Plaintiff was burned by the explosion of gasoline kept in a barrel while using the gasoline in a stove. The Court found that Plaintiff was required to stay in the camp car where he was injured over the week ends and expected to wash his clothes in such camp. The suit was based upon two counts, one upon the Federal Employers' Liability Act and the other upon the common law of the State of Iowa as changed by the Iowa Workmen's Compensation Law. The Court concluded that the case should not have been submitted to the Jury upon the theory that the railroad company was liable under the Federal Employers' Liability Act. The Court also concluded that there was evidence from which the Jury could find that the relation of master and servant existed between the railroad and Plaintiff at the time of Plaintiff's injury.

The case is distinguishable from the instant case because: (1) The Court held that the case should have been submitted to the Jury on the common law of Iowa as amended by the Workmen's Compensation Act of Iowa. The terms of the Workmen's Compensation Act are not quoted in the opinion. The instant case does not involve the Workmen's Compensation Act of any state, but is based solely upon the federal act. (2) Under the facts in the

Milburn case the Court found (a) that Milburn was required to stay in the camp car over week ends unless he was on vacation. (b) The Court further found that Milburn was required to wash his clothes in the camp cars. Neither of these requirements exist in the present case. On the other hand, the Petitioners in the instant case not only did not require Respondent to stay in the railroad car after he was released on Thursday, but did not expect him to stay in said car (R. 51).

The case of *Tiller* v. *Atlantic Coast Line R. R. Co.*, 318 U. S. 54, 87 L. Ed. 610 (1943), is cited. The principal question in that case was whether or not the railroad company could rely upon the assumption of risk of the employee in undertaking to establish absence of negligence on its part. The Court held that the effect of the 1939 amendment of the Federal Act is to "obliterate from the law every vestige of the doctrine of the assumption of risk."

The principle announced in this case is in no way applicable to the issues involved in the case at bar.

Jester v. *Southern Ry. Co.* (1944 Supreme Court of South Carolina), 29 S. E. (2nd), p. 768, is cited. The Court held that it was "A reasonable inference from the testimony that the fireman was at least preparing to use the coal scoop in the discharge of his duties at the time he was shot, and that being an issue, it was properly submitted to the jury." The proof showed that the engineer shot the fireman sometime subsequent to an argument between them over a matter pertaining to their duties on the railroad engine and at a time while they were both on duty for their employer.

It is obvious that the principles involved in this case are not controlling of any issues involved in the case at bar.

35 Am. Jur., Sec. 442, p. 857 is also cited. This reference is authority for the Petitioners. The following language may be found:

> "According to the rule advanced by many cases, 'interstate commerce,' as used in the Act, is used not in a technical, legal sense, but in a practical sense suited to the occasion; and the test which is now the accepted test of the applicability of the statute is whether the employee was, at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it. This test has been varied so as to require that the injured employee shall have been engaged in work which was a part of the interstate commerce of the railroad company, at the time of injury, to be within the provisions of the Act.
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> • • • • • • •
>
> "In many situations, the question whether an employee at the time of sustaining an injury was engaged in interstate commerce has been submitted to the jury for determination. Where, however, there is no controversy as to the circumstances attending the employee's injury, the question as to the nature of his employment is held to be one of law" (pp. 858-9).

L. & N. R. Co. v. *Potts*, 178 Tenn., p. 425, is also cited. In that case a fireman while engaged in switching operations involving cars used in both intrastate and interstate commerce received injuries from which he died. The suit was brought to recover under the Workmen's Compensation Act. The Court held that the deceased was subject to the Federal Act because he was engaged in interstate commerce at the time of his injuries.

The ruling in this case is consistent with the contentions of the Petitioners in the case at bar.

The case of *Great Northern Ry. Co.* v. *Industrial Com.*, 245 Wisc. 375, 14 N. W. 2nd, p. 152 was cited and quoted from extensively.

In this case "Christ Hammer was fatally injured on December 24, 1941, while engaged in work connected with the general repairs of the ore docks. He had worked on the ore docks from May, 1941, to the time of the accident. From May until November 7, 1941, he was a member of a crew engaged in painting and making such repairs as were necessary to be made during the time the docks were in operation . . . When injured Hammer was acting as signal man on a locomotive crane . . ."

The Court said that the appeal presented two questions, one of which was stated by the Court as follows: "(1) Where ore docks are used exclusively for handling iron ore in interstate commerce, is an employee engaged in interstate commerce while making repairs to the ore docks during wintertime when the docks are not in operation?" (page 154).

The second proposition involved a *res adjudicata* question which need not be considered at this time. The Court held that Hammer was engaged in interstate commerce within the meaning of the Federal Act at the time of his injuries. It will be noted that Hammer was working at the time of his injuries. The question of his employment was not involved.

The principle announced by the Court in the *Great Northern Ry.* case does not run counter to the contentions of the Petitioners in the case at bar.

VI

Cases Cited by Supreme Court of Tennessee Distinguished

All of the cases cited by the Supreme Court of Tennessee involve the construction of the 1939 amendment to the Federal Employers' Liability Act except one. In each case the employee was actually at work at the time of the injury. The Court held in each case that the general duties of the

employee furthered or substantially affected interstate commerce and his injury was therefore covered by the Federal Employers' Liability Act.

In those cases the question of whether or not the injured party was an employee of the railroad company was not involved, while in the instant case this question is one of the determinative questions.

The Supreme Court of Tennessee also cited the case of *Orman* v. *Salvo* (Circuit Court of Appeals, 8th Circuit, 1902, 117, Fed. 233). That case, although the opinion does not so state, was apparently an action based upon the common law. The Plaintiff was injured by a blast, while sleeping in a tent near Defendant's operation, and in which he slept while off duty. The Defendant had established the custom of warning the employees who slept in tents of the blasts before they were set off, in order to give them an opportunity to get to a place of safety. On the occasion in question, the warning was not given and Plaintiff was injured as a result of the blast. The Court held that the question whether the warning of the blast was given Plaintiff should be left to the jury, with instruction that if he had such warning and failed to go to a place of safety, he was not entitled to recover. The evidence on the question of the warning was conflicting. The jury found in favor of Plaintiff and the Court approved such finding. In the course of the opinion the Court said:

> "Plaintiff occupied the tent, not as a boarder or tenant, but as a servant of the Defendants, and his board and lodging was received in part compensation for his services. (Wood, Mast. & Serv., 144) But while engaged at his meals or wrapped in slumber he was performing no services for the master, and being in the performance of no employment, but obtaining and enjoying compensation from the master, he was not during such time the fellow servant of any of the employes who were at work, about which he was in no

way engaged or assisting. He was not in the condition of a servant who is being conveyed in a car to his work, but was as much separated from it as if he had been sleeping in his own home a mile away. The master, who had furnished him this lodging, located at a place made dangerous by the discharging of blasts in conducting the master's business, owed him the duty of giving him timely warning, to enable him to avoid the danger . . ."

The principles announced in the above case are not controlling of the case at bar.

VII

United States Supreme Court not limited to consideration of the evidence as stated or referred to by the State Courts in their opinions.

This Court, on Certiorari, is not confined to a consideration of the evidence stated or referred to by the State Courts in their opinions, but will review the entire record and determine for itself whether the evidence sufficed to establish the employer-employee relationship between Petitioners and Respondent at the time of Respondent's injuries; whether the evidence sufficed to establish the conclusion that Respondent was engaged in matters incidental to employment by Petitioners in interstate commerce. This Court will likewise examine all of the evidence to determine if Petitioners were denied a Federal right or immunity by the opinions and judgments of the State Courts.

Gr. Northern Ry. Co. v. *State of Washington,* 300 U. S. 154, 81 L. Ed. 573;

United Gas Public Serv. Co. v. *State of Texas,* 303 U. S. 125, 143, 82 L. Ed. 702;

Chicago Gr. Western R. Co. v. *Rambo,* 298 U. S. 99.

VIII

Writ of certiorari should be directed to Court of Appeals of Tennessee, Eastern Section, sitting at Knoxville, Tennessee.

The decision and judgment of the Court of Appeals were rendered and entered on July 9, 1947 (R. 82-93).

The decision and judgment of the Supreme Court of Tennessee, wherein said Court denied the Writ of Certiorari and thereby refused to take jurisdiction of the cause were rendered and entered October 3 and October 6, 1947, respectively. The decision and judgment of the Court of Appeals of Tennessee became final either on October 3, 1947 or October 6, 1947, the latter date being the date on which the final order was entered putting the opinion into effect. The Court of Appeals of Tennessee was therefore the highest court of the State in which a decision could be had in said cause.

Amer. Ry. Express Company v. *Levee,* 263 U. S. 19; 68 Law Ed. 140.

Conclusion

It is believed that the Tennessee State Courts extended the coverage in this cause far beyond the meaning of the Federal Employers' Liability Act and the purposes of the Congress in the passage of said Act. It is respectfully submitted that the evidence in the Record clearly shows that Respondent was not employed by Petitioners in interstate commerce at the time of his injuries within the meaning of the Federal Employers' Liability Act; that Respondent was not engaged in matters incident to employment by Petitioners within the meaning of said Act, and that the holdings of the Tennessee Courts in these particulars are clearly erroneous. The proof in the Record shows that Respondent was not engaged in the business of Petitioners at the time

of his injuries, but was engaged in personal matters unconnected with Petitioners' business.

Petitioners believe that the State Courts in this cause have decided Federal questions of substance not theretofore determined by this Honorable Court and that such questions were decided erroneously. Petitioners verily believe that they have been deprived of a Federal right or an immunity in contravention of the Federal Employers' Liability Act.

Petitioners further believe that this Court should decide these questions to the end that such decision may be a guide for the lower courts in the future and that a great injustice be corrected.

Petitioners respectfully submit that they have been deprived of a Federal right as a result of findings by the Tennessee State courts shown in the record filed herewith and hereinbefore pointed out, which findings are without evidence to support them.

Petitioners, therefore pray that this Court issue its Writ of Certiorari herein and that the final judgment and opinion of the Court of Appeals of Tennessee rendered herein be reversed.

Respectfully submitted,

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